Supreme Court, U.S.
FILED
JAN 16 1996
OFFICE OF THE CLERK

No. 95-1135

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1995

OZGA ENTERPRISES, INC.,

Petitioner,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, SAM ROCKWEILER, SUSAN JOSHEFFS, JAMES QUINLAN and MARQUETTE COUNTY,

Respondents.

SEPARATE APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

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January 12, 1996

No. _____

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OZGA ENTERPRISES, INC.,

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WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,
SAM ROCKWEILER,
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Office of the Clerk

SUPREME COURT

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You are hereby notified that the Court has entered the following order:

Nos. 94-0660 Ozga Enterprises, Inc. v. DNR
L.C. #92CV26 and 94-0735

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of plaintiff-respondent-cross appellant-petitioner, Ozga Enterprises, Inc., and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Marilyn L. Graves
Clerk of Supreme Court

COURT OF APPEALS
DECISION
DATE AND RELEASED
August 3, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 94-0660
94-0735

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT VI

No. 94-0660

OZGA ENTERPRISES, INC.,

Plaintiff-Respondent-Cross Appellant,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES AND WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,

Defendants-Appellants-Cross Respondents,

GEORGE MEYER,
SAM ROCKWEILER,
SUSAN G. JOSHEFF
AND JAMES B. QUINLAN,

Defendants.

No. 94-0735

OZGA ENTERPRISES, INC.,

Plaintiff-Appellant,

v.

**WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,
GEORGE MEYER,
SAM ROCKWEILER,
SUSAN G. JOSHEFF,
JAMES QUINLAN,
MARQUETTE COUNTY,**

Defendants-Respondents.

APPEAL and CROSS-APPEAL from orders of the circuit court for Marquette County: RICHARD REHM, Judge. *Affirmed in part and reversed in part.*

Before Gartzke, P.J., Sundby and Vergeront, JJ.

VERGERONT, J. This case arises out of the efforts of Ozga Enterprises, Inc. (Ozga) to develop its property in Marquette County. Ozga appeals from an order dismissing all but one of its claims

against the Wisconsin Department of Natural Resources (DNR), two DNR employees, the Wisconsin Department of Industry, Labor and Human Relations (DILHR), and two DILHR employees. Ozga also appeals from an order granting summary judgment to Marquette County on all of its claims against Marquette County. We granted leave to the two state agencies to appeal from a non-final order denying their motion to dismiss Ozga's procedural due process claim against them.[1]

We conclude that Ozga's amended complaint does not state a claim against the state agencies or the state employees for a taking of property without just compensation. Ozga's claims for money damages for violations of substantive and

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[1] Ozga filed a cross-appeal in the state agencies' appeal. Because of our disposition of the issues on appeal, we need not address Ozga's cross-appeal.

procedural due process against the state agencies are barred by the doctrine of sovereign immunity. Ozga's amended complaint does not state a claim against the state employees for either a substantive or procedural due process violation, or under 42 U.S.C. § 1983. Finally, the initial complaint was properly dismissed against Marquette County because that complaint failed to state any claim against Marquette County.

BACKGROUND

Ozga's first complaint named Marquette County and the two state agencies as defendants. The factual allegations were as follows.

Ozga's property is adjacent to a dam that created Mason Lake in Marquette County. Ozga obtained authority from DNR

pursuant to § 31.12, STATS.,[2] to build a penstock and powerhouse on its property. Ozga then received a variance from the County's shoreland zoning ordinance to allow construction of a house and condominium with a reduced setback. Ozga began construction of the condominium on September 1, 1986, and the County ordered Ozga to cease construction the next day.

Ozga then filed applications with DILHR for the issuance of a private sewage system permit and to develop in a floodplain. DNR refused to sign the application to develop in a floodplain because it disagreed with Ozga on the original flood elevation and flood zone designation. DNR informed Ozga of this on

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[2] Chapter 31, STATS., gives the DNR the authority to regulate dams and bridges. Section 31.05, STATS., requires permits from the DNR for the construction of dams. Section 31.07, STATS., requires permits from the DNR for the operation and maintenance of existing dams.

November 13, 1986. In December 1986, the County refused Ozga's application for a zoning permit, stating that the entire property was in a floodplain. Also in December 1986, DNR filed a suit against Ozga alleging a violation of § 31.12, STATS., with respect to the construction of the penstock and powerhouse. That suit resulted in a stipulation to an injunction prohibiting further construction, but permitting Ozga to provide for security and maintenance of existing improvements.

The complaint also alleged that DNR filed a second lawsuit against Ozga on March 11, 1988, for a violation of WIS. ADM. CODE ch. NR 116 for building within a floodplain.[3] On January 31, 1991, this

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[3] WIS. ADM. CODE ch. NR 116 deals with Wisconsin's floodplain management program and requires municipalities to adopt, administer and enforce floodplain zoning ordinances that meet certain criteria. If a county fails to adopt a floodplain ordinance, DNR must adopt one for the

court reversed the trial court order in this second enforcement action and reinstated the jury verdict. The jury had found that DNR's determination of a flood elevation was not reasonable.[4]

The complaint alleged that in 1989, before the trial, Ozga filed additional applications with DILHR for permission to develop in a floodplain and for a private sewage system. These were denied or refused further processing. Because of DILHR's denials, the County refused to issue a sanitary permit or a building permit, preventing completion of the

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county. Section 87.30(1), STATS. WIS. ADM. CODE § NR 116.22(4)(b) and (c) requires DNR to aid municipalities in floodplain enforcement, specifically permitting it to seek an injunction to stop construction in a floodplain until an adequate floodplain ordinance is adopted and approved and to stop construction where it violates an approved ordinance or the provisions of WIS. ADM. CODE ch. NR 116.

[4] By stipulation of the parties, only the floodplain elevation issue was tried.

project and depriving Ozga of all economic use of its property and causing other damages. The County adopted a floodplain ordinance on September 11, 1991, which renders Ozga's property practically and substantially useless for all reasonable purposes and precludes all development of the property.

Ozga asserted claims against all defendants for inverse condemnation, conspiracy and unconstitutional taking, conspiracy and deprivation of property without due process, conspiracy and violation of 42 U.S.C. § 1983, and a violation of § 134.01, STATS. The complaint requested monetary damages.

All defendants moved for summary judgment. On January 19, 1993, the trial court orally granted the County's motion

entirely.[5] It also granted the state agencies' motion on all claims but the procedural due process claim.

Ozga amended its complaint on November 12, 1993. It added four individual defendants: George Meyer, the administrator of DNR's Division of Enforcement and alleged to be involved in the decision to bring enforcement actions against Ozga; Sam Rockweiler, the supervisor of DILHR's plan review unit and the person who denied Ozga's April 13, 1989 application for a private sewer system permit on the ground the construction was in a floodway; Susan Josheff, an environmental engineer employed by DNR who determined that the construction was in a floodway and who refused to sign the

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[5] The trial court's written order granting the County's motion for summary judgment is, for some reason, dated January 1, 1993. The order was not entered until January 10, 1994.

September 11, 1986 and April 17, 1989 applications for permission to build in a floodway; and James B. Quinlan, a DILHR plumbing inspector and plan reviewer.

The amended complaint contained substantially the same factual allegations as the initial complaint. New factual allegations of significance will be discussed below. The amended complaint requested monetary damages and asserted claims for deprivation of property without due process, taking of property without just compensation and without due process in violation of the state and federal constitutions, and a violation of 42 U.S.C. § 1983.

All of the state defendants moved for dismissal of the amended complaint on the grounds of sovereign immunity and that the amended complaint failed to state a claim upon which relief can be granted. The

court granted the motion on all claims against the state agencies, except for the claim regarding procedural due process. As to those claims against the state agencies other than the procedural due process claim, the court decided that the claims were in reality claims against the state and were barred by the doctrine of sovereign immunity and because the state cannot be sued under 42 U.S.C. § 1983. The court concluded that the claims against Meyer were against him in his official capacity and dismissed the claims against him. The other individuals had qualified immunity, the court held, and were also dismissed.

STATE AGENCIES

Whether a complaint states a claim is a question of law that we determine without deference to the trial court's decision. *See* ***Williams v. Security Sav. & Loan Ass'n,***

120 Wis.2d 480, 482, 355 N.W.2d 370, 372 (Ct. App. 1984).[6]

We first consider the state agencies' argument that sovereign immunity entitles them to a dismissal of all claims.[7] The

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[6] Ozga apparently believes that we are to review the grant of summary judgment in favor of the state defendants. This is incorrect. Ozga did not appeal from the order granting summary judgment in favor of the state agencies on all claims in the initial complaint but the procedural due process claim. Rather, Ozga appealed from the order granting the motion of the state agencies and state employees to dismiss the amended complaint on all but the procedural due process claim. In deciding that motion, the trial court did not consider materials outside the pleadings. Therefore, as to the state defendants, we consider only the allegations of the amended complaint and not the materials submitted in connection with the state agencies' motion for summary judgment on the initial complaint.

[7] In its reply brief, Ozga argues that the state agencies waived their right to raise sovereign immunity as a defense because sovereign immunity goes to personal jurisdiction and the state agencies did not cite § 802.06(2)(a)3, STATS., in their motion to dismiss. There is no merit to this contention. The motion stated that the amended complaint should be dismissed because it was barred by sovereign

State of Wisconsin has sovereign immunity and may not be sued for monetary relief without its consent. ***Lister v. Board of Regents***, 72 Wis.2d 282, 291, 240 N.W.2d 610, 617 (1976). This immunity from suit extends to the agencies of the state. *Id.* DNR and DILHR are therefore immune from suit unless the state has consented to suit against them on the claims alleged in the amended complaint. The prohibition in the Wisconsin Constitution against taking property for a public purpose without just compensation[8] is a waiver of sovereign

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immunity, and both parties argued this issue before the trial court.

[8] WIS. CONST., art. I, § 13, provides:

> The property of no person shall be taken for public use without just compensation therefor.

The Fourteenth Amendment to the United States Constitution also entitles a property owner to just compensation if the state or one of its subdivisions takes the owner's land for a public purpose without

immunity for claims alleging a violation of that constitutional provision and seeking just compensation. ***Zinn v. State***, 112 Wis.2d 417, 436, 334 N.W.2d 67, 76 (1983). Ozga cites no authority for a waiver of sovereign immunity on its other claims against the stage agencies except the dissent in ***Grall v. Bugher***, 181 Wis.2d 163, 511 N.W.2d 336 (Ct. App. 1993), *rev'd on other grounds*, ___ Wis.2d ___, 532 N.W.2d 122 (1995). However, the majority in ***Grall*** clearly affirmed the principle of sovereign immunity and the requirement that there be an express waiver, even if the claims allege state and federal constitutional violations and seek relief under 42 U.S.C. § 1983.

We conclude there is no express waiver of sovereign immunity for any claim

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just compensation. ***Gamble v. Eau Claire County***, 5 F.3d 285, 286 (7th Cir. 1993), *cert denied*, 114 S. Ct. 1096 (1994).

asserted in the amended complaint except the claim of a taking without just compensation. The trial court therefore properly dismissed the substantive due process claim. It should have dismissed the procedural due process claim against the state agencies for the same reason.[9] The trial court should not have dismissed the claim of an unconstitutional taking against the state agencies on the ground of sovereign immunity. However, we conclude that claim was properly dismissed because the amended complaint does not state a claim for a taking without just compensation.

The amended complaint alleges that Ozga was denied permits necessary to

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[9] As Ozga concedes, DNR and DILHR are not "persons" amenable to suit under 42 U.S.C. § 1983. *See* ***Will v. Michigan Dep't of State Police***, 491 U.S. 58, 70 (1989) (state agencies are not "persons" within the meaning of 42 U.S.C. § 1983).

construct a condominium on its property and that the basis for the denials was a determination by DNR of the flood elevation that had no reasonable basis.[10] The amended complaint does not state the outcome of the second DNR enforcement action against Ozga after the determination

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[10] Specifically, Ozga alleges in the amended complaint that its September 11, 1986 application for permission to develop in a floodplain identified the regional flood elevation as 796.0 feet above mean sea level; that at the time DNR and Josheff refused to sign it, the only available information was that the regional flood elevation immediately downstream from the property was 796.0 feet above mean sea level; that Josheff and DNR did not complete their calculations of the regional flood elevation at Ozga's property until sometime in October 1987, and did so without a public hearing; that the average lake level in Mason Lake since 1965 has been set at 798.4 feet above mean sea level; that the Park Service Commission and later the DNR have maintained the level of Lake Mason approximately one foot higher than the minimum level in order to avoid irritating riparian owners of property on Mason Lake, thereby raising the regional flood elevation.

of the flood elevation.[11] Liberally construing the amended complaint in Ozga's favor, we read it to allege that DNR's denial of Ozga's request to build in a floodplain was determined to be in error, as was the denial of the other applications insofar as they were based on DNR's erroneous determination of the flood elevation. Ozga argues that DNR's and DILHR's denials of its applications on an erroneous basis constitute an unconstitutional taking because they deprived it of all economically viable use of its property.

In the absence of physical occupancy or possession, private property can be

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[11] The amended complaint does allege that on February 4, 1992, DILHR returned Ozga's application and 1989 request to build in a floodplain, indicating that any renewed submittal would be treated as a new application. But, although the amended complaint was filed on November 12, 1993, it does not allege what happened to Ozga's applications after February 4, 1992.

taken for public use only by state, county or municipal action that imposes a legally enforceable restriction on the use of the property. ***Reel Enters. v. City of La Crosse***, 146 Wis.2d 662, 674, 431 N.W.2d 743, 749 (Ct. App. 1988). A legally imposed restriction that the adopting agency later repeals, rescinds or amends may be a compensable temporary taking. ***Id.*** at 677, 431 N.W.2d at 749. ***See also Zinn***, 112 Wis.2d at 429, 334 N.W.2d at 73. But if a court reverses the agency's action that created the restriction, a legally imposed restriction does not exist and no taking has occurred. ***Reel Enters.***, 146 Wis.2d at 676-77, 431 N.W.2d at 749-50.

There is no allegation in the complaint that DNR or DILHR repealed, rescinded or amended its denials of Ozga's applications. The only reasonable inference we can draw from the allegations

concerning the second enforcement action is that DNR's and DILHR's actions in denying Ozga's applications were invalid because they were based on an erroneous determination of flood elevation as found by the jury in that action. Those actions, therefore, were not legally imposed restrictions and the amended complaint does not state a claim for an unconstitutional taking.[12]

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[12] Ozga also argues in its brief that inverse condemnation has occurred. The initial complaint did assert a claim for inverse condemnation under § 32.10, STATS., as well as a claim for an unconstitutional taking. However, the amended complaint makes no reference to either § 32.10 or to inverse condemnation. Section 32.10 permits the owner of land that has been occupied by a person possessing the power of condemnation to institute condemnation proceedings by presenting a verified petition in circuit court asking that condemnation proceedings be commenced. Even if we were to read the amended complaint as attempting to assert a claim under § 32.10 for inverse condemnation, the amended complaint would not state a claim under § 32.10 for the same reason it does not state a claim for an unconstitutional taking. The requirement of a legally

STATE EMPLOYEES

The amended complaint does not state a claim for an unconstitutional taking against the state employees. It is the state (or county or municipality) and its agencies that take property for public purposes, not the employees of the agencies. Moreover, since the amended complaint does not state a claim for an unconstitutional taking against the state agencies, it follows that the amended complaint does not state a claim against the employees who acted for those agencies.

We now consider Ozga's argument that the individual state employees deprived it of property without procedural due process.[13] We continue to limit our

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enforceable restriction applies to both claims. ***Reel Enters.***, 146 Wis.2d at 674-75, 431 N.W.2d at 749.

[13] We read the amended complaint to raise due process claims under both the state and federal constitutions. The state

analysis to the allegations in the amended complaint. In addition to the allegations concerning the denials and refusals to approve Ozga's applications, the amended complaint alleges that no defendant provided Ozga with written notice of disapproval of its applications as required by WIS. ADM. CODE § ILHR 83.06(4),[14] and that Ozga exhausted all administrative

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constitution's guarantee of due process is the functional equivalent of the federal constitutional guarantee. ***State v. McManus***, 152 Wis.2d 113, 130, 447 N.W.2d 654, 660 (1989).

[14] WIS. ADM. CODE § ILHR 83.06(4)(c) provides:

> *Written notice* The county shall issue written notice to each applicant whose sanitary permit application is disapproved. Each notice shall state the specific reasons for disapproval and amendments to the application, if any, which render the application approvable. Each notice shall also give notice of the applicant's right to appeal and the procedures for conducting an appeal under ch. 68, Stats.

remedies of which it had notice. The amended complaint also alleges that defendants failed to respond to Ozga's notices of claim, which it filed on June 29, 1989 and August 31, 1989. We conclude the amended complaint fails to state a claim against the state employees for a violation of Ozga's right to procedural due process.

The fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner. ***In re Christopher D.***, 191 Wis.2d 681, 702, 530 N.W.2d 34, 42 (Ct. App. 1995). Section 227.42(1)(a), STATS., provides that any person filing a written request with an agency for a hearing has the right to a hearing if a "substantial interest of the person is injured in fact or threatened with injury by agency action or inaction." The plain language of this

provision indicates that Ozga could have requested a hearing on the denials or refusals of its applications by the state agencies. To the extent Ozga is complaining of delay, it could have requested a hearing based on agency inaction.

The amended complaint does not allege that Ozga requested a hearing before either DILHR or DNR and was not given a hearing. It does not allege that the procedures for a hearing under ch. 227, STATS., were either unavailable to it or inadequate. The allegation that Ozga was not advised of its right to a hearing as required by WIS. ADM. CODE § ILHR 83.06(4) is not relevant to a procedural due process claim against the state employees because that provision applies, by its terms, to counties. The allegation that Ozga exhausted all administrative remedies of which it had

notice is not a sufficient factual allegation to state a claim for a violation of procedural due process against the state employees in view of the availability of ch. 227. Ozga has not alleged in the amended complaint, or pointed out in its brief, any requirement that the individual state employees inform it of its right to request a hearing or of the availability of ch. 227. Finally, the allegation that the state employees failed to respond to the notices of claim Ozga filed does not state a claim against them. Section 893.82, STATS., does not require any state employee, much less the four state employees named as defendants in this action, to respond to a notice of claim.

Turning to the claim of substantive due process, we conclude the amended complaint fails to state such a claim against the state employees. Considering

only the factual allegations and not the legal conclusions, the essence of the pertinent allegations is that the state employees did not have a reasonable basis for the calculation of the flood elevation on which they based the denials of Ozga's applications.

The cases Ozga cites do not support its argument that these allegations are sufficient to state a claim for a violation of substantive due process. These allegations do not, even liberally construed, constitute the type of government action where power is used for purposes of oppression, where there is an abuse of power that shocks the conscience or where government action is not sufficiently keyed to a legitimate state interest. *See* ***Polenz v. Parrott***, 883 F.2d 551, 558 (7th Cir. 1989). Nor do they show that the state employees acted without

authority under state law, which the court in ***Brady v. Town of Colchester***, 863 F.2d 205, 215 (2nd Cir. 1988), suggested could constitute a violation of substantive due process in a zoning context.[15] Ozga had a procedural vehicle for challenging the inaction or erroneous action of the state employees involved in denying its applications but, based on the allegations in the amended complaint, Ozga did not use those procedures. The disputed issue was resolved favorably to Ozga in the second DNR enforcement action. We conclude the amended complaint does not state a claim for a violation of substantive due process.

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[15] We note that the United States Court of Appeals for the Seventh Circuit in ***New Burnham Prairie Homes, Inc. v. Village of Burnham***, 910 F.2d 1474, 1481 (7th Cir. 1990), disagreed with ***Brady v. Town of Colchester***, 863 F.2d 205, 215 (2nd Cir. 1988), and held that, in addition to alleging that the decision was arbitrary and capricious, the plaintiff must show either a separate constitutional violation or the inadequacy of state law remedies.

Because the amended complaint does not state a claim against the state employees for any federal constitutional violation, it does not state a claim against them for a violation of 42 U.S.C. § 1983. *See* ***Riedy v. Sperry***, 83 Wis.2d 158, 163, 265 N.W.2d 475, 478 (1978) (a cognizable claim under 42 U.S.C. § 1983 requires a showing that the plaintiff has been deprived of a right secured by the federal constitution by a person acting under color of state law). We therefore do not reach the issue of whether the state employees had qualified immunity under § 1983, the issue which the trial court found dispositive.

MARQUETTE COUNTY

Our review of a grant of summary judgment is de novo and we apply the same standard as the trial court. ***Brownelli v. McCaughtry***, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). We first examine

the complaint to determine whether it states a claim. *Id.* If it does not, the defendant is entitled to a dismissal of the action and we need not examine the answer or any materials beyond the complaint.

The factual allegations of the initial complaint[16] with respect to the County are that because DILHR denied Ozga's application based on DNR's erroneous determination of flood elevation, the County refused to issue a sanitary permit or building permit and did so without notifying Ozga of its right to a hearing under WIS. ADM. CODE § ILHR 83.06(4). The County is also alleged to have adopted a floodplain ordinance that will prevent development of Ozga's property.

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[16] We examine only the initial complaint because Ozga appeals from the trial court's order entered January 10, 1994, granting summary judgment to Marquette County on all of Ozga's claims in its first complaint against Marquette County.

We conclude the complaint does not state a claim against the County for an unconstitutional taking. The County may not issue a building permit unless the property owner has a sanitary permit. Section 66.036(1), STATS. A county may not issue a sanitary permit for a holding tank without the approval of DILHR. WIS. ADM. CODE § ILHR 83.08(1)(b). We have already held that the actions of the state agencies alleged in the complaint did not constitute an unconstitutional taking. It follows that no taking claim is stated against the County for failing to issue permits that it was prohibited from issuing based on the state agencies' actions.

The allegations concerning the floodplain zoning ordinance adopted by the County is not sufficient to state a claim for an unconstitutional taking. According to the initial complaint, the County had

not yet adopted an ordinance at the time the County refused to issue the permits. If there is other action or inaction of the County pursuant to the ordinance it adopted on September 11, 1991, that constitutes an unconstitutional taking, the initial complaint does not say what that is.

Because the County, in view of the state agencies' actions, did not have authority to issue the permits, the County's failure to do so does not state a claim for a denial of substantive due process by the County. Nor does the County's failure to give written notice of disapproval of Ozga's application for a sanitary permit constitute a denial of procedural due process. The action or inaction that Ozga is contesting is the refusal of the state agencies to approve its applications because of the dispute over the flood elevation. The County

cannot grant the sanitary permit without the state agencies' approval. An appeal under ch. 68, STATS., the Municipal Administrative Procedure Act, of the County's failure to issue the permit does not provide a meaningful opportunity for Ozga to contest the action that is allegedly depriving it of the use of its property--the refusal of the state agencies to approve Ozga's applications. The failure of the County to give Ozga notice of that procedure is therefore not a violation of its right to procedural due process.

As we explained, in the absence of any viable claims against the County for a violation of federal constitutional rights, the initial complaint does not state a claim against the County under 42 U.S.C. § 1983.

By the Court.--Orders affirmed in part and reversed in part.

Not recommended for publication in the official reports.

Nos. 94-0660(D)

94-0735(D)

SUNDBY, *J. (dissenting).* Ozga presents seven issues. I limit my dissent solely to the following issue:

> In an action which involves a taking of private property for public use without just compensation, are the state agencies protected under the doctrine of sovereign immunity when the state impliedly consents to suit under the terms of the state constitution?

The just compensation clause, article I, § 13 of the Wisconsin Constitution, is a partial surrender of the state's sovereign immunity. Nonetheless, the state argues that even if the amended complaint contains the essential elements of a claim for inverse condemnation, "[w]e state unequivocally that the trial court's order dismissing all state defendants because they are immune from this suit is correct and must be affirmed." *Zinn v. State*, 112

Wis.2d 417, 334 N.W.2d 67 (1983), is perhaps the most cited decision interpreting the just compensation clause. In that case, the court said that:

> Art. I, sec. 13 of the Wisconsin Constitution is self-executing and needs no express statutory provision for its enforcement. This is because just compensation following a taking "is a constitutional necessity rather than a legislative dole." The "waiver" to the doctrine of sovereign immunity is found in the constitution itself and thus no legislative direction pursuant to Art. IV, sec. 27 is necessary.

Id. at 436, 334 N.W.2d at 76 (citation omitted).

The majority recognizes that the state and its agencies may not erect the defense of sovereign immunity to avoid liability for a taking. However, the majority concludes that Ozga's "taking" claim was properly dismissed because "the amended complaint makes no reference to either §

32.10 or to inverse condemnation." Maj. Op. at 12 n.12.

As in *Zinn*, this review comes before this court on a motion to dismiss.

> Thus the sole issue before the court is whether the plaintiff's complaint states a claim upon which relief can be granted. In determining whether the complaint was properly dismissed by the court of appeals, "we apply the familiar test that the pleadings are to be liberally construed to do substantial justice between the parties, and the complaint should be dismissed as legally insufficient only if it appears to a certainty that no relief can be granted under any set of facts that the plaintiff can prove in support of her allegations."

Zinn, 112 Wis.2d at 423, 334 N.W.2d at 70 (quoting *Strid v. Converse*, 111 Wis.2d 418, 422, 331 N.W.2d 350, 353 (1983)).

Ozga's complaint details the denials of permits by defendants which it claims have deprived it of the opportunity to develop its property. Ozga alleges that:

> 58. Defendants' actions have deprived [Ozga] Enterprises of all economically viable use of the property.
>
> 59. Defendants' actions have prevented Enterprises from realizing its investment expectation with respect to the [p]roperty.
>
> 60. Enterprises has not been compensated for the loss of viable economic use of the property nor for the diminution in value.

Clearly, the complaint states a claim for the taking of its property without just compensation.

For these reasons, I respectfully dissent.

STATE OF WISCONSIN **MARQUETTE COUNTY**
CIRCUIT COURT

OZGA ENTERPRISES, INC.,
a foreign corporation **ORAL DECISION**

Plaintiff,

v. Case No. 92CV26

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,
and MARQUETTE COUNTY,

Defendants.

The following telephonic proceedings were had upon the hearing of the above-entitled matter held at the Courthouse in the City of Portage, Columbia County, Wisconsin, before

HONORABLE RICHARD L. REHM,

Acting Circuit Judge of Marquette County, Wisconsin, on the 19th day of January, 1993, commencing at about 2:32 in the afternoon.

APPEARANCES:
ALAN KORPADY, Attorney at Law, Madison, Wisconsin, representing the Plaintiff.

GORDON BALDWIN, Attorney at Law, Madison, Wisconsin, representing the Plaintiff.

JOANNE KLOPPENBURG, Assistant Attorney General, representing the State of Wisconsin DNR and DILHR.

MARK HAZELBAKER, Attorney at Law, Madison, Wisconsin, representing Marquette County.

*** *** ***

(Whereupon the following telephonic proceedings were duly had:)

THE COURT: This was set as a status conference. As you know, I have been working on the decision with respect to the motions for summary judgment. I have reached a decision on all of the five claims and what I am going to do is I'm going to advise you of the decision, dispositionally, and not go into the basis of those decisions by telephone. I will consider that the decision is not rendered until such time as the written decision is issued, which should be quite soon. But

the reason I'm doing this is I want to move the matter forward so that we can work toward resolution. Is that satisfactory to you, Mr. Korpady?

MR. KORPADY: Yes, your Honor. Thank you.

THE COURT: Mr. Hazelbaker:

MR. HAZELBAKER: Yes, it is, your Honor.

MS. KLOPPENBURG: Yes, your Honor.

THE COURT: All right. With respect to Claim 1, which is the inverse condemnation claim as to Marquette County, the Court is granting the summary judgment. I also -- I have to apologize. We have some background noise associated with construction that is being done at the courthouse. If any of you in the course of the conversation have difficulty hearing, please advise me promptly and we'll see if we can adjust that.

MR. KORPADY: Your Honor, this is Al Korpady. I thought that was Mr. Hazelbaker celebrating.

MR. HAZELBAKER: Yeah.

THE COURT: All right. As to Claim 1 and DNR and the Department of Industry, Labor and Human Relations, the Court is going to grant summary judgment on that portion.

Claim 2 is the unconstitutional taking cause as to Marquette County. The Court is going to grant the summary judgment motion. As to DNR and Department of Industry, Labor and Human Relations, I will also grant that motion.

On Claim 3, the -- what I'll conceptualize as the procedural due process cause, the Court is going to grant the summary judgment motion as to Marquette County. As to the Department of Natural Resources and the Department of Industry,

Labor and Human Relations, the summary judgment will be denied.

As to the fourth claim, which is the 1983 action, the Court will grant summary judgment as it relates to DNR and the Department of Industry, Labor and Human Relations. And the Court is also going to grant summary judgment to Marquette County.

On Claim 5, which is the statutory cause, the Court is going to grant summary judgment to all defendants.

Now, with re -- that basically will take Marquette County out of the action entirely, with the exception of the remaining issue of actual costs for which they have moved. The Court has not made a determination as to exactly how I'm going to handle that. If we get to the issue of -- I mean, if I determine that I'm going to award costs, Mr. Hazelbaker --

MR. HAZELBAKER: Your Honor --

THE COURT: Yes? Sorry. I have this noise in the background.

MR. HAZELBAKER: I understand, your Honor. I used to work in a courthouse and I've been through remodeling.

THE COURT: Yes. Obviously we have a question of -- of the costs and expenses that might be involved here. Do you wish to defer submitting information in that regard or scheduling a hearing in that regard until I've actually made a decision and determination of -- of whether or not they're going to be awarded?

MR. HAZELBAKER: I would prefer to do all -- to handle all of it at once since I suspect much of the evidence will be the same, or at least some of it will. I'd rather do it that way than do it piecemeal.

THE COURT: All right.

MR. HAZELBAKER: In other words, what I'm saying is I wouldn't envision

submitting a bill of costs for the statutory items of cost under Chapter 814 in general until such time as we know what the Court's ruling will be on -- the ruling will be on the merits of our other motion.

THE COURT: Then we'll defer that, and the same will apply with respect to the Department of Industry, Labor and Human Relations and DNR because even though a claim survives here, there may be some question on some of the other causes of action.

MR. HAZELBAKER: Understandably.

THE COURT: Now, I'd like to proceed to scheduling here, if that's satisfactory to Mr. Korpady and Ms. Kloppenburg.

MS. KLOPPENBURG: Yes, your Honor. It would be helpful to receive the decision first, I think.

MR. KORPADY: I have to concur, your Honor. We have to know, before we can

schedule, whether we're going to pursue an appeal at this point.

THE COURT: All right. So you -- you would prefer to do that rather than doing anything scheduling-wise on the due process claim?

MS. KLOPPENBURG: Yes, our Honor. I would like to see the decision first before determining what should be done next.

THE COURT: All right. Well, I'm more concerned about Mr. Korpady's position in that regard, and what is your position?

MR. KORPADY: Your Honor, I have to agree. I'd prefer to see the decision before we decide where we're going and when we're going to get there.

THE COURT: All right. Then we'll continue to defer scheduling.

MR. KORPADY: Your Honor, do I understand that you're continuing your protective order as to the one issue left?

THE COURT: Well, I want to give some thought to that. Now, assuming that we're proceeding only on the procedural due process claim, what discovery near term here do you anticipate, Mr. Korpady, if we were to proceed?

MR. KORPADY: Your Honor, I think we're going to have to see what the

(PORTIONS OMITTED)

STATE OF WISCONSIN MARQUETTE COUNTY
CIRCUIT COURT

OZGA ENTERPRISES, INC.,
a foreign corporation

Plaintiff,

TELEPHONIC HEARING-COURT'S ORAL DECISION AND MOTIONS

v.

Case No. 92CV26

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,
and MARQUETTE COUNTY,

Defendants.

The following proceedings were had upon the hearing of the above-entitled matter held at the Courthouse in the City of Portage, Columbia County, Wisconsin, before the

HONORABLE RICHARD L. REHM,

Circuit Judge of Columbia County, Wisconsin, on the 7th day of January, 1994, commencing about 2:57 in the afternoon.

APPEARANCES:

ALAN E. KORPADY and EDWARD S. MARION, Attorneys at Law, Madison, Wisconsin, representing the Plaintiff.

JAMES C. McKAY, Assistant Attorney General, Madison, Wisconsin, representing the Defendant State Agencies.

(Whereupon the following telephonic proceedings were duly had:)

THE COURT: We are appearing in Ozga Enterprises, Inc. vs. Wisconsin Department of Natural Resources, Marquette County Case Number 92CV26. There are several matters to attend to here today and I'm going to give some decisions first and then we'll address remaining issues.

First of all, there remains a -- the motions of the state agencies dated February 24, 1993 which were subsequently briefed and require decision. To some extent, the motions are affected by the amendment of the pleadings. It's also noted that some of the arguments on this or

these motions relate to arguments on the motions to dismiss the amended complaint. Therefore, I first want to address these remaining motions.

The only cause of action which remained in the original complaint was the cause against the state agencies relative to procedural due process, and the state argued for dismissal of that remaining cause of action on a couple of bases. One, they argued that the Court lacks subject matter jurisdiction on the plaintiff's federal due process claims based upon the eleventh amendment to the U.S. Constitution, allegedly barring suits against the state unless statutorily authorized and pursuant to the decision in Will vs. Michigan Department of State Police at 491 U.S. 58 that the state is not a "person," in quotes, within the meaning of 42 U.S. Code Section 1983. In other

words, a 1983 action against the state is not possible because it is not a person. With respect to this latter principle, the Court agrees and it was on that basis that the Court originally dismissed the plaintiff's 1983 cause of action against the state agencies.

As argued by the plaintiff, the state's immunity from suit under the eleventh amendment to the U.S. Constitution is not applicable in this case. The eleventh amendment prohibition against suits against the state is inapplicable in state courts. The state agencies argue that the only remedy available to the defendant are state law remedies under Chapter 227 of the Wisconsin Statutes or under inverse condemnation. However, the, in quotes, "self-executive," end quotes, nature of the constitutional rights -- of certain constitutional rights has been

acknowledged in cases such as Zinn v. State, 112 Wis. 2d 417, cited by the plaintiff. And under that reasoning or the reasoning of that case, constitutional claims are not automatically barred by sovereign immunity if state law claims are inadequate.

Plaintiff's remaining cause of action is based upon the state agencies' alleged deprivation of his property based upon decisions not having a reasonable factual basis. The focus of the plaintiff's argument is upon the procedures followed by the agencies because of the particular manner in which the plaintiff's applications were processed and the consequences of agency actions or inaction. It appears that the plaintiff has no adequate remedy at law short of suit based upon the constitutional due process issue. Therefore, consistent with the ruling in

Zinn, direct suit against the state appears appropriate here under the very unusual circumstances of this case.

The state agencies also have argued that the Court lacks subject matter jurisdiction with respect to the plaintiff's state law procedural due process claim because the exclusive method for judicial review of state agency decisions is under Chapter 227 and strict compliance with the procedures of that chapter are required. In particular, it is argued that the plaintiff did not properly file a petition for review. Many of the allegations of the plaintiff relate to the -- to failure of the state agencies to act upon its applications. Because this -- of this inaction, there is not, at least with respect to portions of the plaintiff's claim, a, in quotes, "decision," end quotes, of the agencies to review.

The Court is not focusing upon the time limits for filing requests for review under Chapter 227, but the existence of events which would normally result in triggering a request for review under that chapter. In the absence of that event and in light of the plaintiff's allegations respecting procedural due process, I find that the plaintiff is not foreclosed from suit against the state without following the procedure outlined in Chapter 227 respecting judicial review. Therefore, based upon the foregoing, the Court at this time is denying the motions to dismiss made by the defendants.

Now, I want to move then to the current motions to dismiss filed on behalf of the defendants dated December 3rd, 1993. Here, the defendants have made several motions to dismiss which have been briefed and which the Court has reviewed at length.

I'll first address the arguments respecting the issues of the bar of the state -- the statute of limitations.

The defendants have argued that Section 1983 causes of action are governed by a three-year statute of limitations and there appears to be no dispute in that regard. Here the original complaint was filed February 13, 1992. The amended complaint which added four individual defendants was filed November 2nd, 1993. Defendants argue that plaintiff's cause of action arose as a result of denials of permit applications in April and May of 1989. The plaintiff has argued that there has been a continuing violation of the constitutional rights of the plaintiff and/or that the statute did not -- the statute of limitations did not begin running until February 4, 1992 when the plaintiff's last application was returned

without action on behalf of the state agencies.

Because of the nature of plaintiff's allegations regarding procedural irregularities and procedural unfairness which relate to matters which go beyond the denial of the applications, the Court finds that it is not appropriate to fix the terms from which the statute of limitations would run based upon the dates of the denial of the applications in April and May of 1989. The allegations are of a continuing violation of procedural due process which extend to February 4, 1992, and therefore the statute of limitations has not run.

The plaintiff has also made the argument that the bar of the statute of limitations can be avoided by the, in quotes, "relation back," end quotes, provisions of Section 802.09(3) of the Wisconsin Statutes. And under that

provision, the -- a party may be added if, to paraphrase the basic provisions, one, the claim arises out of transactions or occurrences set forth in the original complaint; two, that some event or transaction occurred within the period provided by law for commencing the action; three, the added party has received notice of the commencement of the action so as not to be prejudiced; and four, the party knew or should have known that, but for a mistake in identity, the action would have been brought against them.

The Court acknowledges here that there was really no mistake as to identification of the proper parties, as argued by the state agencies. However, there is the intent of the provisions of Section 809.02(3) to deal with what appear to be the -- to avoid prejudice to the parties that are joined at -- beyond the statute of

limitations period, and as we discussed in Korkow vs. General Casualty Company of Wisconsin, 117 Wis. 2d 187 as cited by the plaintiff.

Here the transactions alleged in the amended complaint are nearly identical to those allegations and causes raised in the original complaint. The added parties were aware of the litigation. That is particularly true with respect to Defendants Josheffs, Quinlan, and Rockweiler. Their actions are the alleged underlying basis for plaintiff's cause of action and they actively participated in the litigation and preparation of defenses to this action.

The added parties are represented by the office of the attorney general, which of course if intimately familiar with the case as a result of their representation of the two defendant state agencies. Under

these circumstances, it appears that there is no significant prejudice to the added parties to permit the computation of time with respect to the statute of limitations to relate back to the date of the commencement of the original action, which would have been within the time required to commence the action if one concedes that the denial of the applications in 1989 triggered the running of the statute. Such a result does not violate general principles underlying the statutes of limitations under the particular circumstances of this case. Therefore, the motions to dismiss based upon the bar of the statute of limitations is denied.

The next issues deal with questions of sovereign immunity in several forms. First, the state agencies or the defendants have argued that it and its agencies are immune to actions under Section 1983

because they are not persons, as previously noted. And as previously noted, the leading case in that regard is Will vs. Michigan Department of State Police, a U.S. Supreme Court case. That principle, as noted, is the basis for the previously dismissed 1983 action against the state, and likewise, any such claim in the amended complaint against the state or its agencies directly is -- is dismissed.

Next, the defendants also argue that sovereign immunity extends to the individual defendants. This position is based upon an argument that a suit for nonprospective relief only against a state official and in the state official's official capacity is no different than a suit against the state itself. With respect to this argument, the Court considers that defendant Secretary Meyer is in a somewhat different category and

position than the other named individual defendants. As to defendant Secretary Meyer, it appears, based on the allegations in the complaint, that he is being sued in his official capacity. And unlike the other named individual defendants, the amended complaint does not contain allegations regarding specific actions of the secretary which would constitute violations of procedural due process in the application for permit -- permits made by the plaintiff. Therefore, the Court will grant the state's motion to dismiss the amended complaint as it relates to Secretary Meyer.

The amended complaint does allege that the other individual defendants are being sued as individuals for specific actions take by them in connection with the permit application process. Therefore, they are not being sued in their, in quotes,

"official capacity," end quotes, and the state's motion or the defendants's motions to dismiss on that basis with respect to the other three individual defendants is denied.

The next issue related to sovereign immunity is that of qualified immunity. And the Court has paid particularly close attention to the standards respecting this argument as set forth in the following cases cited by the parties: Baxter vs. DNR at 165 Wis. 2d 298, Barnhill vs. Board of Regents at 166 Wis. 2d 395, and Polenz vs. Parrott at 883 F.2d 551. I will not review at length the basic bases for qualified immunity but will note the following elements necessary for evaluating the defendant's arguments that the individual defendants have qualified immunity.

One is the issue of whether or not the acts of the individuals were discretionary,

and two, whether their conduct violated a clearly established statutory or constitutional right. The primary focus of the arguments have been whether the contours of the rights involved are sufficiently clear that a reasonable official would unde stand that what was done violated the right. The defendants argue that merely raising due process in a general manner is not adequate, and further, the defendants have noted based on the Barnhill case that the burden is upon the plaintiff to establish the, in quotes, "clearly established," end quotes, constitutional rights involved.

The defendants frame their arguments in terms of the constitutional right to -- to the issuance of a sewer permit. However, the rights involved are framed in a broader fashion by the plaintiff. In fact, the constitutional rights relate to

the issuance of permits affecting the use of the plaintiff's property and alleged procedural irregularities regarding the same. Although the plaintiff's allegation is general with respect to procedural due process, it is specific with respect to the alleged defects in that process. The alleged procedural defects are set forth in the amended complaint. Furthermore, these are rights which had been clearly established at the time of plaintiff's applications or the processing of the applications, being substantially rights of procedural fairness.

However, the defendants go beyond the issue of whether or not the constitutional right is clearly established. And based upon the Polenz decision, the state, the defendants, have argued that there is another prong of the test to determine whether or not qualified immunity is

applicable. And that argument arises from the following quotation at page 559 of the Polenz decision, and I'm quoting from that case

"For purposes of qualified immunity, it is not enough to assert that a broad or abstract right, such as the right to due process or the right to exclusive use and enjoyment of one's land, is clearly established. Rather, the Court must frame the right in the context of the particular action. Here, we believe the inquiry consists of two parts. The first question is whether it was clearly established in 1984 that under the due process claims property owners have a right to be free from arbitrary and irrational decisions of local zoning or land use officials on applications for permits relating to land use. The second question is whether in light of pre-existing law a reasonable

official should have known that the available state law remedies were inadequate."

And it is this second element identified in Polenz that the defendants have raised and argued effectively. And I find that a reasonable official would not have known that the state law remedies were inadequate to address the plaintiff's procedural due process concerns. And as noted by the state, there are specific procedures set forth within Chapter 227 of the Wisconsin Statutes which are most commonly used for the purpose of challenging actions of the state agencies in their administrative functions. A reasonable official under the conditions alleged in the amended complaint would not know of any reason why such procedural protections under existing state law would not be appropriately used by the plaintiff.

Therefore, on this basis, the Court will grant the motion on behalf of the individual defendants to dismiss the -- the amended complaint as to them. And based upon these foregoing rulings, it is not necessary to address further the issues raised -- the other issues raised in the argument, in particular, exhaustion of remedies in this context, nor the issue of notice of claim requirements.

Therefore, we stand now with the two state agencies as the remaining parties to the lawsuit. I'm going to direct that Mr. McKay draft the orders resulting from these decisions. Is that satisfactory to you, Mr. McKay?

MR. McKAY: Yes, sir.

THE COURT: All right. You'll submit those to the Court with five days' notice to counsel for the plaintiff, and without objection, the Court will sign them. Now,

we remain with pending motions regarding the jury view and the motion with respect -- the motion in limine, both motions having been made by the plaintiff.

MR. McKAY: Your Honor?

THE COURT: Yes.

MR. McKAY: Jim McKay. May I ask a clarification question?

THE COURT: Yes.

MR. McKAY: I understood the Court to say in addressing our new motions, if you will, the December motions to dismiss --

THE COURT: Yes.

MR. McKAY: -- that the Court granted the motions of the state agencies under the sovereign immunity argument. And so as I would understand that, or at least my question is that then dismisses the entire suit with your ruling on the individual defendants.

THE COURT: No, it does not. It -- it -- it only relates to the 1983 action.

MR. McKAY: My understanding, according to the transcripts in here, was that that was all that was left.

THE COURT: No, that's not -- that's not correct.

MR. McKAY: What is -- what is left then?

THE COURT: The procedural due process challenge to the actions of the agencies. I assume that is your understanding, Mr. Korpady.

MR. KORPADY: Yes, your Honor.

MR. McKAY: Isn't that a 1983 action?

THE COURT: No, it is not. That is the distinction that the Court was making with respect to Zinn. Is that understood?

MR. McKAY: Well, I'm not sure I understand it. My understanding of the transcript, which of course I was not at

the January '93 status conference, was, as Mr. -- or the plaintiff indicated in its brief, that the Court indicated you'd reached a decision on all the claims and were going to dismiss them all.

THE COURT: Oh, no, that's not correct. There remained the procedural due process issue and that was the reason on the motions made by Ms. Kloppenburg following those initial decisions -- Actually, she first raised it in connection with a request for a protective order and then later raised it as a separate motion or separate set of motions to dismiss the -- event the procedural due process remaining cause of action. Is that consistent, Mr. Korpady, with your recollection?

MR. KORPADY: Yes, your Honor.

THE COURT: So I'll now proceed to the -- these additional motions that relate

directly to the trial of the proceedings. First, with respect to the plaintiff's request for the -- for the jury view, the Court believes that a view of the physical features of the premises involved here will be beneficial to the jury and is necessary to promote an understanding of the issues involved. I recognize and clearly recognize the main -- remaining issues are ones of procedural due process only. However, the physical features of the property are an integral part of the facts associated with the procedural issues.

I also recognize, based upon the representations made by Mr. McKay

(PORTIONS OMITTED)

MR. McKAY: No. I'm afraid I'm it.

THE COURT: All right. What is the status of Ms. Kloppenburg?

MR. McKAY: Well, she's right now on maternity leave or -- (inadequate telephonic transmission)

THE COURT: Has she delivered or --

MR. McKAY: Yes. They had a baby girl.

THE COURT: Well, great, great. All right, then I will look forward to receiving materials from you on Tuesday and then seeing you on Wednesday morning bright and early.

MR. McKAY: Judge?

THE COURT: Yes.

MR. McKAY: Jim McKay. I need to make a request on the record.

THE COURT: Yes.

MR. McKAY: A couple of things, and I will go ahead and ask it even though it's repetitive, and then I have a request to make of the Court. While you were talking about the motion in limine, I dug out the

original complaint. The only procedural due process claims that I see in there, and obviously the Court and Mr. Marion and Mr. Korpady are more familiar with this than I am, are procedural due process under the constitution. And so I remain, I will confess, unclear as to what the remaining due process issue is that is going to be tried, because all I see -- the only allegations I see are under the constitution, which will then give rise to my next request, but I'm hoping that perhaps the parties or the Court would be so kind as to answer that for me. I don't see a theory other than under the constitution, which then, as I say, gives rise to another request.

THE COURT: Okay. That's -- that's -- you're correct that it's that -- I believe it was the third cause of action; is that correct, Mr. Korpady?

MR. KORPADY: I don't have that, your Honor. I can take a second and get it if it would help.

THE COURT: I believe it was the third cause of action in the original complaint.

MR. McKAY: That's the one I'm looking at.

THE COURT: Um-hum.

MR. McKAY: That's what gave rise to my previous confusion, Judge, when there was indications in the plaintiff's brief with the quote from the original transcript of your conference in January of '93 that all five, and there are only five alleged in the complaint, were going to be dismissed against the state agencies.

THE COURT: No.

MR. McKAY: And that was my understanding when I asked it the first time, what was left to be tried based on

that transcript and the Court's ruling today.

THE COURT: All right. Well, I don't know where you derived that perspective.

MR. McKAY: From the plaintiff's brief.

THE COURT: Oh, well, then it -- It's in the plaintiff's brief. It was --

MR. McKAY: It's a quote from the transcript of the January '93 hearing.

THE COURT: All right. Well, that -- that's -- that was an incorrect statement if -- I'm not sure where that arises. But Mr. Korpady, that would have been incorrect; isn't that right?

MR. KORPADY: I'm not sure I followed Mr. McKay's line. I don't know quite what he's getting at, your Honor.

MR. McKAY: I'm sorry. It indicated to me that the original five claims against the two original state agency defendants

were in the process of being dismissed. But with these dismissals, including sovereign immunity as against the individuals, it appeared to me that the entire action was dismissed.

MR. KORPADY: That's certainly not what we intended to convey, your Honor, and I don't know that that's the purport of the language.

THE COURT: I don't know, but I've clarified that that isn't the case, Mr. McKay.

MR. McKAY: So --

THE COURT: That gives rise to what request you're going to make now?

MR. McKAY: All right. If I understand the Court, it is the third cause of action which is being tried.

THE COURT: Well, it relates to the -- the allegations that were originally made in the third cause of action of the

original complaint. Let me just -- If you can hold on just a second here.

Yes, I'm correct. It was this third cause of action. The second cause of action was the substantive due process argument.

MR. McKAY: So what is set to go to trial are the allegations in the third cause of action only against the two state agencies.

THE COURT: That's correct. Now, what is your -- what is your request?

MR. McKAY: All right. What I need to ask -- excuse me -- I would formally ask the Court, because we believe that -- The sovereign immunity, the absolute immunity issue, is one that obviously the Court has ruled against us on. We believe that that is also subject to an immediate appeal, because the cases that talk about qualified immunity indicate that sovereign immunity

issues are immediately appealable for the same reasons, that it is an immunity from suit. And if we are prohibited from appealing that immediately, then the efficacy of that immunity remedy is absolutely gone if we have to go through trial. So I ask the Court to stay the trial to allow us to take that appeal on the sovereign immunity issue in regards to the two stat agency defendants.

Now, Mr. Marion and I had a conversation yesterday -- I don't know if we got this specific -- where he indicated the plaintiff would not oppose our request for a stay although they would fight the grounds of the appeal.

THE COURT: Mr. Marion?

MR. MARION: Well, your Honor, I have to say, I don't think Mr. McKay anticipated the -- the specificity of your Honor's rulings. I know I didn't. And I'm -- and

I'm -- the conversation that Jim and I had, I think, to be quite candid, was around this qualified immunity business. And I told Jim that if indeed the law was that an order requiring the individual defendants to go to trial, even though they claimed they had qualified immunity, was immediately appealable, I wouldn't oppose his request for a stay because that's just inviting the Court of Appeals to stay it. And I wouldn't look very good if I forced them to do that if there was an automatic right of appeal.

I have to say, and I hope Jim doesn't think this is unfair, I don't understand why the state would have an automatic appeal given the Court's rulings today with respect to what is left. The qualified immunity defense has been acknowledged by the Court and the motion to dismiss those defendants was granted.

THE COURT: I think Mr. McKay is saying that he believes that the issue still goes to sovereign immunity, the decision of the Court, but as it relates now to the state agencies. Is that correct, Mr. McKay?

MR. McKAY: That's correct, your Honor. And the same cases that talk about immediate appealability because it's an immunity from suit regarding the qualified immunity question, they predicate using the same reasons for immediate appealability of qualified immunity rulings as are used in the immediate appealability of absolute or sovereign immunity rulings, because it's the same animal, if you will. Both of those are immunity from suit, not from liability or damages, which can be appealed after a trial. If we cannot appeal the question or denial -- the denial of our motion for dismissal of the state based on

sovereign immunity, the usefulness of that remedy is gone if we're forced to trial. So it's the same reasoning for immediate appealability of both qualified immunity and absolute or sovereign immunity.

THE COURT: Yes. Mr. Marion.

MR. MARION: I would -- With respect to Mr. McKay, I don't see it that way. There's absolute immunity under 1983, the absolute immunity of individual persons to not have to stand trial, or there's absolute immunity for judges on judicial decisions and prosecutors for prosecutorial decisions. The individuals are out of this case completely. With respect to sovereign immunity, frankly, I fail to see a credible appeal on the claim that the eleventh amendment would bar this lawsuit, and I don't know how else sovereign immunity is implicated. The state can't foreclose

access to its own courts for vindication of federal constitutional rights.

MR. McKAY: I understand Mr. Marion disagrees with what might happen on the appeal and with our argument, and I appreciate that. But my point is that I believe we have a right to try and immediately appeal this for the same reasons, that if our claim of sovereign immunity is denied, which the Court has done, and we are forced to go to trial and then later appeal it, that remedy then or theory or doctrine of sovereign immunity has -- has no efficacy whatsoever because it them becomes nugatory because we're forced to defend ourselves through trials which ultimately may be reversed because of sovereign immunity or those doctrines to avoid those trials and the later reversal.

And I think we have a very equitable argument under -- not only under terms of

equity, but an argument that we ought to be able to appeal this immediately rather than be forced to trial, and should we get an adverse verdict, or regardless of which way the verdict comes down, have to fight an appeal later and perhaps come out with -- with a result favoring the immunity question.

THE COURT: Well --

MR. KORPADY: This is Al Korpady.

THE COURT: Yes.

MR. KORPADY: If I may, first, I'm not sure I agree. My reading of the cases on qualified immunity lead me to at least two observations. One is I'm not sure I agree it's an immunity from suit as opposed to immunity from damages. Especially the state law cases seem to talk more in terms of the immunity from liability for damages than they do from liability -- or suit. And second, I believe if you look at the

qualified immunity cases, they deal with the qualified immunity of individuals and are predicated on basically the recognition that if state officials had to go to court every time they did something that somebody didn't like, government would grind to a screeching halt. I -- I suggest, your Honor, that the same reasoning is not applicable to state agencies, which are more than adequately prepared to go to court and to still do the ordinary business of the state, plus they do it all the time.

THE COURT: All right, but Mr. Korpady, what is being argued here is not -- I understand the analogy you're drawing or comparison you're drawing. It's not on the qualified immunity question. Mr. McKay is taking the position that the state agencies are immune. They can't be sued under 1983, nor can they be sued in the

fashion that they're being sued here; isn't that correct, Mr. McKay?

MR. McKAY: Yes, sir.

THE COURT: Well, and -- and I -- I suppose that is an issue that he has a right to pursue. I am not enthusiastic about staying the proceeding. I've done -- I had hoped that we would proceed to trial. I -- I believe, however, that if there is some recognizable basis upon which to claim immunity here, to go to trial would not be appropriate. Therefore, I -- I am inclined to grant the stay and permit the appeal.

MR. McKAY: All right, your Honor. Want a separate order on that then, too?

THE COURT: Absolutely.

MR. McKAY: All right.

THE COURT: Which effectively takes us off calendar.

MR. McKAY: Five day -- Sorry. Didn't mean to interrupt you.

THE COURT: I'm sorry. Yes, you can do it on the same basis.

MR. McKAY: All right.

MR. MARION: Your Honor, if I may, I'd like -- I'd like Mr. McKay to -- to commit that he's going to actually file this appeal and that he'll do that within the ten days of -- of this order so that we're not held in -- in limbo.

MR. McKAY: Well, I -- I -- I can assure you that I will. And I know Edward doesn't mean it this way, but I don't do these things lightly either. And I certainly don't represent to court and counsel that I'm going to ask for a stay to appeal and then just sit there.

MR. MARION: I certainly didn't mean to suggest that.

MR. McKAY: I know he isn't suggesting that, but you can rest assured.

MR. MARION: As to the timing, just so it's done quickly so that we can keep moving ahead. That's all.

MR. McKAY: Sure.

THE COURT: And I think it's not inappropriate that there be some time frame here. And I don't want to be -- make it difficult for anyone, but Mr. McKay, what do you believe a reasonable time for this appeal to be made would be for you? Is ten days, twenty days? What -- what would you desire?

MR. McKAY: I suspect I'm going to have to ask the Court of Appeals, even though our theory is that this isn't right, but the state cases indicate that these are the type that are granted. So from the -- we have ten days from the date you sign the order in order to file that petition. And it will be filed as soon as possible after that.

THE COURT: All right. That would seem satisfactory and you can provide that in the order.

MR. McKAY: Okay.

THE COURT: Well, I will advise the clerk of court of Marquette County that they will call off their jury. And I will look forward to receiving your documents, gentlemen.

MR. McKAY: All right.

THE COURT: Thank you very much.

MR. MARION: Perhaps it's unnecessary to say, but we won't have to file the jury instructions and the like.

THE COURT: Absolutely unnecessary to say, Mr. Marion. Those -- those requirements with respect to the documents and preparation for trial are no longer necessary and it isn't even necessary of course to enter the order in that regard.

MR. MARION: Your Honor, I'd like to thank you very much for the obvious care and attention you've given on these issues, and you've dealt with this with great specificity and subtlety. I appreciate it.

THE COURT: Well, counsel, you all know that the issues in this case are very deem and very complicated. And I -- and I am conscientious about trying to -- to respond to the arguments and not simply doing something off the cuff, and I appreciate your appreciation of that. I'm going to disconnect at this time.

MR. KORPADY: Thank you, your Honor.

MR. MARION: Thank you.

MR. McKAY: Thank you, Judge.

(Proceedings concluded at 3:55 p.m.)

*** *** ***

STATE OF WISCONSIN)
) ss.
COUNTY OF COLUMBIA)

I, CHRISTINE M. CHAMPEAU, Official Court Reporter of Branch III of the Columbia County Circuit Court, State of Wisconsin, do hereby certify that the foregoing is, to the best of my ability under the telephonic reporting conditions then present, a full, complete and correct transcript of the proceedings had on the hearing in the above-entitled matter as the same are contained in my stenographic notes taken on said proceedings.

Dated this 19th day of January, 1994.

_____
Court Reporter, RPR-CM

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Appeal Nos. 94-0660 and 94-0735

OZGA ENTERPRISES, INC.,

Plaintiff-Respondent-Appellant-
Cross Appellant,

v.

Marquette County
Case No. 92-CV-26

WISCONSIN DEPARTMENT OF NATURAL RESOURCES, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, MARQUETTE COUNTY, SUSAN JOSHEFFS, SAM ROCKWEILER, GEORGE MEYER, and JAMES QUINLAN,

Defendants-Appellants-Respondents-
Cross Respondents.

BRIEF OF OZGA ENTERPRISES, INC. AS PLAINTIFF-APPELLANT IN APPEAL NO. 94-0735

APPEAL FROM A JUDGMENT OF THE CIRCUIT COURT FOR MARQUETTE COUNTY, THE HONORABLE RICHARD L. REHM, JUDGE

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(PORTIONS OMITTED)

1. Ozga's Amended Complaint States A *Prima Facie* Cause Of Action Under The Takings Clauses In Both Federal And State Constitutions.

There is there is no set formula for determining when government action effects a taking. Penn Central Transportation Company v. New York City, 438 U.S. 104, 124 (1978). The U.S. Supreme Court, however, made clear that regulation effects a taking if it either: (1) fails to substantially advance a legitimate state interest; or (2) denies an owner all economically viable use of his or her land. *See* Nollan v. California Coastal Commission, 483 U.S. 825, 834 (1987); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). Even though a property owner is not deprived of all economically valuable use of land, regulation may still constitute a taking depending on (1) the character of the

government action, (2) the economic impact on the property, and (3) the impact on the owner's investment-backed expectations. Penn Central, 438 U.S. at 124.

Government action will constitute a taking if (1) it imposes a legally enforceable restriction; and (2) facts indicate deprivation of all, or practically all, use of the property. Busse v. Dane County Regional Planning Commission, 181 Wis. 2d 527, 541, 511 N.W.2d 356 (Ct. App. 1993).

There is no suggestion in this case that either the floodplain regulations in Chapter NR 116, Wis. Adm. Code, or the County's floodplain ordinance fail to substantially advance a legitimate state interest. Ozga recognizes that Chapter 31, Stats., and the County's zoning ordinances are legally enforceable restrictions. That is, of course, precisely the point of

Ozga's takings claims; not to mention half its *prima facie* case.

Ozga must also show that either (1) the government's action denied to it all, or substantially all, economically beneficial or productive use of the landowner's property or (2) that the character and economic impact of the government's action, taken together with the effect on the property owner's investment-backed expectations, constitute a taking of a portion of the owner's property. *See*, Lucas v. South Carolina Coastal Council, 505 U.S. ___, 120 L.Ed.2d 798 (1992); Penn Central, 438 U.S. at 124.

Ozga unquestionably alleged all of the essential elements of both a federal and state takings claim:

(1) Ozga is the owner of the Property. R.51:¶9.

(2) On September 2, 1986, the County's zoning administrator, Mr. Stapleton, ordered Ozga to

cease construction on the property because Ozga had not obtained a building permit. R.51:¶16.

(3) Since at least on or about November 11, 1986, DNR and Ms. Josheffs have refused to "verify" the RFE and Flood Zone designations in Ozga's applications to DILHR purportedly because the Property is in the floodway of Mason Lake. R.51:¶¶25 and 26.

(4) DNR has maintained the level of Mason Lake at one foot higher than minimum levels, to avoid irritating riparian property owners on Mason Lake, with effect of raising the RFE at the property. R.51:¶53.

(5) Because DNR and Josheffs refuse to sign Ozga's PLB 89 Form, DILHR refused to approve Ozga's application for a private sewage system permit. R.51:¶31.

(6) Because DILHR refused to approve Ozga's application, the County has refused to issue either a sanitary permit or a building permit. R.51:¶42.

(7) The effect of the Defendants' actions has been to prevent any further development of the Property, impose substantial economic losses on Ozga and frustrate Ozga's legitimate,

investment-backed expectations. R.51:¶¶37, 54, and 57 to 59.

(8) Defendants' actions have forced Ozga to leave the Property economically idle for the last 8 years and have deprived Ozga of all or substantially all viable economic use of the Property. R.51:¶60.

This record entitles Ozga to trial.

2. The Amended Complaint Contains All The Essential Elements Of A Claim Under The Due Process Clause In Both Federal And State Constitutions.

Due process is implicated when a state action deprives a citizen of a protected property interest. Estate of Wolff v. Westown Town Board, 156 Wis. 2d 588, 596, 457 N.W.2d 510 (1990).

The Amended Complaint contains allegations reaching all the essential elements of a due process claim:

(1) Ozga is the owner of the Property. R.51:¶¶8 and 9.

(2) In connection with its application for a building permit, Ozga was required to apply for a sanitary permit and a permit to develop in a floodplain. R.51:¶¶17 and 18.

(3) DNR and Josheffs disagreed with the RFE and the flood zone designation stated in Ozga's PLB 89. R.51:¶¶25 and 26.

(4) DNR and Josheffs refused to sign Ozga's PLB 89 on the grounds that the RFE and flood zone designation stated in Ozga's PLB 89 were incorrect. R.51:¶¶25 and 26.

(5) At the time DNR and Josheffs originally refused to sign Ozga's PLB 89, and until at least as late as December of 1987, no Defendant had calculated the RFE at the site. R.51:¶27.

(6) No determination has ever been made of the horizontal boundaries of the floodway at the site. R.51:¶27.

(7) Under the circumstances, Josheffs' refusal to sign Ozga's PLB 89 was arbitrary and capricious. R.51:¶¶64 and 67.

(8) Defendant Marquette County denied Ozga's applications without giving Ozga notice of its right to a hearing. R.51:¶65.

(9) The effect of Defendants' actions has been to deprive Ozga of all economically viable use of the property and to prevent Ozga from realizing its investment-backed expectations at the Property. R.51:¶¶57 to 60.

3. The Amended Complaint Contains The Essential Elements Of A Claim For Inverse Condemnation.

To be entitled to maintain an inverse condemnation suit, Ozga must demonstrate that it has been deprived of all, or particularly all, of the beneficial use of its property or any part thereof. Hillcrest Golf v. Altoona, 135 Wis. 2d 431, 435, 400 N.W.2d 493 (1986). *See also,* First English Evangelical Lutheran Church of Glendale View, Los Angeles County, 482 U.S. 304, 315 (1987). As demonstrated above, Ozga stated that claim.

4. The Amended Complaint Contains The Essential Elements Of A Claim Under Title 42 U.S.C. §1983.

The Amended Complaint also contains all the essential elements of a claim under Title 42 U.S.C. §1983. The essential elements of a §1983 claim are:

1. Persons;
2. Acting under the color of state law;
3. Deprived the Plaintiff;
4. Of a right secured by the Federal Constitution;

Paul v. Davis, 424 U.S. 693, 696-97 (1976). *See also*, Riedy v. Sperry, 83 Wis. 2d 158, 163, 265 N.W.2d 475 (1978).

The Amended Complaint contains the essential elements of a § 1983 claim:

(1) Defendants Quinlan, Josheffs, Rockweiler and the County constitute persons under §1983. R.51:¶¶4-8.

(2) All of whom were acting under the color of state law in reviewing and acting upon Ozga's permit applications. R.51:¶69.

(3) The actions of Quinlan, Josheffs, Rockweiler and the

> County deprived Ozga of its right to build on the property without just compensation and without due process. R.51:¶¶67 and 68.

Ozga will concede that, after Will v. Michigan Department of State Police, 491 U.S. 58 (1989), DNR and DILHR do not constitute "persons" amenable to suit under §1983. There is no reason to question whether the Amended Complaint states a claim under §1983 against the other Defendants.

5. **Summary Judgment Is Inappropriate Because Neither The State Nor The County Stated A Defense To The Claims Alleged In The Amended Complaint.**

Because the Amended Complaint states a *prima facie* cause of action, the Court next looks to the Defendant's motion papers to see if they have presented a defense that defeats the Plaintiff's claim. Johnson, 151 Wis. 2d at 745.

Defendants presented essentially two defenses to Ozga's claims. First, Defendants argued that their actions (or inaction) do not constitute a taking and did not deprive Ozga of property without due process. Second, Defendants argue that there are jurisdictional protections available to them, such as sovereign or qualified immunity, or doctrines of judicial economy, such as the exhaustion of administrative remedies doctrine, that protect them from liability regardless of whether or not the action constitutes a taking.

6. None Of The Defendants Stated A Defense To Ozga's Takings Claims.

a. Categorical Takings.

Under both the Federal and Wisconsin Constitutions, private property cannot be taken for public use without payment of

just compensation. U.S. Constitution Amendments V and XIV. Wisconsin Constitution, Article 1, §13. While regulatory takings jurisprudence is at times muddled, the basic premise of the law is firmly established:

> When a property owner has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Lucas, 120 L.Ed.2d at 815. *See also* Zinn v. State, 112 Wis. 2d 417, 424, 334 N.W.2d 67 (1983).

A private cause of action for damages may be brought directly under the takings clauses in both the state and federal constitutions. First English Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304 (1987). Zinn, 112 Wis. 2d at 424.

Where regulation deprives the owner of all economically beneficial use of the

property, it constitutes a "categorical" taking and requires compensation without regard to the purpose of the regulation or the circumstances of its enforcement. Lucas, 505 U.S. at 820 to 821. The government may avoid paying compensation for such "categorical" takings only if the proscribed use interests were not part of the owner's title to begin with. In particular, the government must:

> prove that its law or decree [does] no more than duplicate the result that could have been achieved in the courts--by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance or by the State under its complementary power to abate nuisances that affect the public generally or otherwise.

Lucas, 505 U.S. at 821.

After Lucas, the only defense to Ozga's takings claim is for the Defendants to show either that there is no taking or that they would have been entitled to

impose the same conditions or obtain the same result at common law. In meeting its burden, the government can not rely on the gratuitous, self-serving distinction between "harm-preventing" and "benefit-conferring" regulations. *See* Lucas at (818). Instead, as Defendants would be required to do if they sought to restrain Ozga in a common-law action for public nuisance, they:

> must identify background principles of nuisance and property law that prohibit the uses [the landowner] now intends in the circumstances in which the property is presently found. Only on this showing can [the government] fairly claim that in proscribing all such beneficial uses, [the government] is taking nothing.

Lucas, 120 L.Ed 2d at 822-823.

The government must demonstrate a "nexus" between any permit condition it would impose and the end advanced as justification for the condition. Nollan,

483 U.S. at 837; Dolan v. City of Tigurd, 512 U.S. ___, 129 L.Ed.2d 317 (1994). If such a nexus exists, the government must also show that it made an individualized factual determination that the required condition was related both in nature and extent to the impact of the proposed development. Dolan, 129 L.Ed.2d at 320.

As their defense, the Defendants relied substantially on what they characterize as the "public trust" doctrine. *Citing* Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), the Defendants suggest that, in Wisconsin, when the government acts to prevent public harm, even though the enactment deprives an owner of a substantial portion of the potential value of property, it does not give rise to an obligation to compensate. *See*, R.26: p. 14-15.

The United States Supreme Court, in Lucas, unequivocally rejected that approach. Professor Joseph L. Sax, writing on the impact of the Lucas case, recognized as much:

> *Lucas* may thus be viewed as the [U.S. Supreme] Court's long-delayed answer to the decision by the Wisconsin Supreme Court in *Just v. Marinette County* . . . . [T]he Court repudiates the conclusion of *Just*, and instead effectively reverses the Wisconsin court's conclusion that 'it is not an unreasonable exercise of [police] power to prevent harm to public rights by limiting the use of private property to its natural uses.

Sax, Property Rights and the Economy of Nature: Understanding *Lucas v. South Carolina Coastal Council*, 45 Stanford Law Review 1433, 1439-40 (1993) (emphasis added).

The Court in Lucas recognized that, especially in the case of regulation of land:

> . . . the notion . . . that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

Lucas, 505 U.S. ____, 120 L.Ed.2d at *Id.*

After Lucas, the government can avoid compensating Ozga only if the condominium, at common law, constituted a nuisance. They can not defend by relying on self-serving characterizations of the regulation as preventing public harm. Rather, after Dolan, the Defendants must demonstrate a *nexus* between the conditions imposed on Ozga's permit applications and document individualized factual findings that the conditions are "roughly proportionate" in both nature and extent to the impact of the proposed development. There is nothing in this record sufficient to establish a "nuisance defense" to Ozga's takings claims

and nothing evidencing any "individualized" factual consideration of Ozga's permit applications.

The government's defense must be comprised of something more than the fact that Ozga intends to build on its property. It is axiomatic that ". . . development of a residential lot does not constitute a nuisance." Bowles v. United States, 31 Fed. Cl. 37 (1994).

In the Trial Court, the government suggested that the Briggsville Dame was "unsafe" and was, therefore, a nuisance. There is no such evidence in this record. Moreover, the safety, *vel non*, of the dam was never given as a reason for denying Ozga's permit. The Briggsville dam is the dam owner's responsibility, not Ozga's. Its safety, or lack of it, is no basis for denying Ozga's permit applications and is no defense to Ozga's takings claims.

DNR and DILHR also refer to numerous statutes that characterize construction in a floodplain or floodway as a nuisance. This, of course, assumes a fact not in evidence in this record; namely that the property is in a floodway. More to the point, however, DNR and DILHR rely on "the legislature's declaration the uses [Ozga] desires are inconsistent with the public interest"; an approach clearly rejected by the Lucas Court. *See*, Lucas, 120 L.Ed.2d at 822-823.

The County's reliance in the Trial Court on two cases to argue that Ozga's proposed construction constituted a nuisance and could have been prevented at common law is, at best, misplaced. The first case, State v. Douglass, 4 Wis. 403 (1854), concerns maintenance of a dam rather than construction of a building. Again, the Briggsville dam is not, or at

least should not be, at issue in this case. The County's suggestion that Douglass applies because "[t]he structure built by Plaintiff is just as capable of displacing water outside of its natural course" is not only facially absurd, but clearly goes beyond this record. R.30:p. 16. There is nothing in this record establishing that the Property is in the floodway and nothing suggesting the building would be in jeopardy or pose any danger whatsoever during a flood.

The second case is State v. Trudeau, 139 Wis. 2d 91, 408 N.W.2d 337 (1987), recons. den. 145 Wis. 2d 894, 434 N.W.2d 786; *cert. den'd,* 108 S. Ct. 701, 484 U.S. 1007, 48 L.Ed.2d 652. The County's reliance on that case is misplaced. The Court merely held that §87.30(2), Stats., is an alternative statutory means of

enforcing local floodplain zoning ordinances.

(PORTIONS OMITTED)

7. Defendants' Jurisdictional And Judicial Administration Defenses Are Insufficient To Support Summary Judgment.

The appellants all claim immunity from suit. DNR and DILHR suggest they have sovereign and qualified immunity from all claims. Meyer claimed sovereign immunity from all claims because he was allegedly sued in his official capacity. Messrs. Quinlan, Rockweiler, and Ms. Josheffs claimed qualified immunity from all claims because the constitutional rights here involved were not sufficiently clear at the time of the action for a reasonable state employee to have known the action constituted a constitutional violation. The County claimed no qualified or sovereign immunity.

a. Ozga's State And Federal Law Claims Are Not Barred By Sovereign Immunity.

The State suggests that all Ozga's state law claims except inverse condemnation are barred by sovereign immunity. State's Brief at Page 23. The doctrine of sovereign immunity has only limited application to actions against the State which allege a constitutional taking of private property without just compensation. Zinn, 112 Wis. at 435. Sovereign immunity cannot bar actions for just compensation. *Id.* Article 1, Section 13 of the Wisconsin Constitution is self-executing and needs no express statutory provision for its enforcement. *Id.* Ozga's claims under the federal Constitution and 42 U.S.C. §1983, therefore, are not subject to Wisconsin's sovereign immunity.

With respect to Ozga's due process claims, it is clear that a complaint

against state employees in their individual capacities is not barred by state sovereign immunity. *See* Lister v. Board of Regents, 72 Wis. 2d 282, 299, 240 N.W.2d 610 (1976). These Individual Defendants were not sued in their official capacities. Ozga can concede that Defendant Meyer, based on subsequent discovery, may not be properly subject to this action. The other three Individual Defendants, Ms. Josheffs, and Messrs. Quinlan and Rockweiler, are, however, appropriately parties to this action. Each was sued not because he or she holds a particular position but because their acts taken together and under color of state law deprived Ozga of its property without just compensation and without due process of law.

b. The Defendants Are Not Entitled To Qualified Immunity.

The issue of qualified immunity is a question of law to be decided by the Court. Barnhill v. Board of Regents, 166 Wis. 2d; 395, 406, 479 N.W.2d 917 (1992). Factual disputes relative to the immunity claim, however, preclude summary judgment. Archer v. Sanchez, 933 F.2d 1526, 1531 (10th Cir. 1991).

Qualified immunity for discretionary acts does not apply to agencies but merely immunizes acts of individual public officials for discretionary acts taken in their official capacity. C.L. v. Olson, 143 Wis. 2d 701, 708-715, 422 N.W.2d 614 (1988). Consequently, neither DNR, DILHR nor the County can claim qualified immunity from suit.

The defense of qualified immunity must be denied where Plaintiff demonstrates, at

the time of violation, that the right was clearly established such that a reasonable official would understand that what he or she is doing violates that right. Baxter v. DNR, 165 Wis. 2d 298, 307, 477 N.W.2d 648 (Ct. App. 1991).

Ozga had a clearly established constitutional right to build on its own property subject only to legitimate permitting requirements. Nollan, 483 U.S. at 853, fn.2. Ozga also had a right to be advised of the reasons its applications were being denied, or even when they were "non-approved." Ozga had a right to a decision on its permit applications based not on hearsay, conjecture or guesswork but on reasonable investigation into the facts. Ozga had a right to rely on the judgment of this and lower courts with respect to the RFE at his property and to insist that the government recognize that judgment in

connection with its permit applications. *See*, Nollan at 687.

Those rights were clear at the time Ozga first applied for a building permit and throughout the course of this ordeal. The decisions establishing those rights predate Ozga's original application. The government is charged with conforming its behavior to the law. Moreover, this appeal does not raise questions regarding subtleties or nuances of Defendants' behavior. The abuses visited on Ozga are gross violations of its constitutional rights.

The question then devolves to whether it was reasonable for the Defendants to act as they did in the face of those clearly established rights without knowing that they violated the law. Manifestly it was not.

c. Plaintiff Did Not Fail To Exhaust Its Administrative Remedies.

The Defendants argue that the Amended Complaint fails to state a claim under 42 U.S.C. §1983 because Ozga allegedly failed to file an adequate notice of claim. The notice of claim requirement, however, applies to neither federal constitutional actions nor to actions under 42 U.S.C. §1983. Defendants have cited Kramer v. Horton, 128 Wis. 2d 404, 383, N.W.2d 54 *cert. denied*, 476 U.S. 918 (1986), for the proposition that a §1983 plaintiff must exhaust state administrative remedies before going to court. Kramer, however, was reversed on precisely that issue in Casteel v. Vaade, 167 Wis. 2d 1, 17, 481 N.W.2d 477 (1992).

Moreover, the U.S. Supreme Court has made it absolutely clear that neither the notice of claim statute nor a common law

exhaustion requirement will bar an action under §1983. Felder v. Casey, 139 Wis. 2d 614, 408 N.W.2d 19 (1987) reversed at 487 U.S. 131, 147 (1988). While §893.82(2)(m), Stats., requires strict compliance with the requirements of the statute, this provision was not added to the law until the 1991-92 biannual state budget, therefore, it does not apply to notices of claim filed by the Plaintiff. 1991 Wisconsin Act 39, Section 3582.

Finally, if there was any administrative or judicial remedy available to the Plaintiff for Defendants' actions, no notice of it was given to the Plaintiff. While this may be understandable under the circumstances, it is clear failure to afford Ozga the process to which it was constitutionally due.

The Kramer case relied on by Defendants is still a good law on at least

one issue. The case does stand for the proposition that, if a state administrative body "either cannot or will not afford [a person] adequate relief . . .", exhaustion is not required prior to bringing a §1983 action. Where there is evidence that the agency is biased or unwilling to hear the claim or is "delaying review unnecessarily," exhaustion is not required either. Kramer, 128 Wis. 2d at 420.

It flies in the face of common sense and fairness to suggest that, after nearly six years of pursuing permit applications, defending lawsuits, and dealing with state agencies and their employees, Plaintiff has somehow failed to exhaust its administrative remedies. More likely the gravamen of Defendants' concern here is that they failed to exhaust Ozga.